

ML10 Handout – Torts II: Right of Privacy

[slide numbers are in square brackets]

1) [2] Right of Privacy Intro

- a. Defamation deals with harm to **reputation**, whereas the right of privacy deals with the **right to be _____ left alone**
- b. Four Right of Privacy Torts
 - (1) **false light** invasion of privacy (FLIP)
 - (2) **intrusion upon seclusion**
 - (3) **public disclosure of a private fact** (PDPF)
 - (4) **misappropriation** of name, likeness and identity (NLI)

2) [3] False Light Invasion of Privacy (FLIP)

- a. Definition: A false statement or report that makes a person to appear to be someone he or she is not in the eyes of the public
- b. Elements: (1) Publicity placing the Plaintiff in a false light (_____ identification _____); (2) discloses information presented as factual but is **actually false**; (3) highly **offensive to a _____ reasonable person (RP)**; (4) causes actual damage to the Plaintiff
- c. **Element 2: Information that is presented as true but actually false; court will look at the Defendant's intent**
 - i. Information must be misleading and offensive
- d. **Element 3: Highly offensive to a reasonable person (RP); societal standard**
- e. **Element 4: Damages - can be any harm (not just reputation)**
 - i. Ex: harms to privacy, dignity, or emotion

[4] FLIP Factors

- f. **Embellishment** - Adding false material to otherwise true facts
- g. **Distortion** - Omitting facts or context to make an otherwise accurate story appear false
- h. **Fictionalization** - Including some element or truth in a largely fictional piece

- i. **Distinctions from Defamation:** (1) Plaintiff has to prove actual malice, regardless of whether the Plaintiff is a public or private figure figure. In defamation, private figures prove negligence. (2) Statement needs to be made to a mass group; only 1 person is needed for Defamation

[5] FLIP Cases

summary judgement: means before trial they determined there was no issue

- j. **Facts:** E! documentary on Paula Abdul references alleged affair with disqualified American Idol contestant Corey Clark back in 2005 during Season 2 of American Idol. Clark sues E! network. Result? case was dismissed on summary judgement (before trial) Why? Corey Clark wasn't able to prove actual malice

3) [6] Intrusion Upon Seclusion – A physical or technological disturbing into someone's reasonable expectation of privacy (**REOP**)

- a. **Elements:** (1) Defendant intentionally intruded into a private place, conversation, or matter (2) highly offensive to RP; (3) P has **REOP** in the information
- b. What do we have a high REOP in? your person and your property
- c. Limited REOP: invited guests, attending concert/sporting event
- d. No REOP: trespassing, public property, employer, borders/customs
 - i. **Electronic Intrusion** - Employers/customs can read people's e-mails or texts
- e. **Defenses to Intrusion:** (1) **Consent**; (2) **False Pretenses**; (3) **Newsworthiness**
- f. **[7] Sanders v. ABC** - Undercover reporter posed as a psychic, employee discussed her personal hopes and dreams which was broadcast on national TV; **network found liable** as an employee has a REOP that their conversations will not be secretly videotaped

4) [8] Public Disclosure of Private Facts (PDPF)

- a. **Definition:** The publication of truthful private information that is not of legitimate public concern

- b. **Elements:** (1) **Public disclosure** (2) **of a private fact** which is (3) not of legitimate public concern and (4) the disclosure is **highly offensive to a reasonable person**
- c. **Element 1: Public Disclosure** – Applies if disclosure made to a small group of people with a _____ special relationship _____
(ex: _____ co-workers _____)
- d. **Element 2: Private Fact** - Involves a person's _____
most personal information _____ (ex: _____ financial situation, _____
marital status, Professor Spitz's extra toe _____)
- e. **Element 3: Not of Legitimate Public Concern** - Plaintiff must show that the information being disclosed is _____ not newsworthy _____

i. **Newsworthiness Factors** - proximity, timeliness, significance, prominence, human interest
- f. [9] *Diaz v. Tribune* – Magazine company interviews Plaintiff under the pretense of their student council record and discloses their gender reassignment surgery.
i. Result? Defendant **publisher was found liable** as this was a _____ morbid and sensational prying, and not newsworthy _____
- g. [10] **PDPF 1st Amendment Defense** - Protects the publication of private facts if there is some _____ public significance _____ and the information was _____ lawfully obtained _____

5) [11] Misappropriation of NLI

- a. **Definition:** Where a company uses your _____ name _____, _____ likeness _____ and _____ identity _____ without permission for commercial gain
- b. The right of publicity includes the right of survivorship _____, which can be willed to family
- c. [12] **Right of Publicity/Commercialization Elements:** (1) NLI was used; (2) in a manner that **identified** that person; (3)

distributed; (4) for _____ commercial or trade purposes _____ ;
(5) without permission

- d. **[13] Vanna White v. Samsung:** Ad campaign features Wheel of Fortune co-host as a robot turning letters next to a game board. White not compensated or asked permission.
Result? _____ White won \$400,000; example of misappropriation _____

6) [14] Right to Privacy Tort Defenses

- a. **Defenses:** Newsworthiness, Public Domain, Incidental (de minimis) Use, Consent, 1st Amendment
- b. Media entities and publishers have the right to _____ editorial discretion _____ under the 1st amendment. The 1st Amendment also protects using celebrities' names in media so long as the material concerns matters of public interest _____

7) [15/16] 1st Amendment: Transformative Use & Artistic Relevance

- a. **Transformative Use** - Is something _____ new _____ being created from the work itself?
- b. **Elements of fact and fiction put together make a work transformative and** _____ protected under the 1st Amendment
- c. **1st Am:** Court balances Plaintiff's interest in their _____ NLI _____ against the Defendant's interest in _____ freedom of expression _____

[17] 1st Amendment Defense - Artistic Relevance Test

- d. *Rogers v. Grimaldi* – Ginger Rogers sues MGM for releasing movie called “Ginger and Fred”. Allegedly misleading title is protected unless it has no relevance to the work or misleads to the work’s source
- e. **[18] Trademark Infringement/False Advertising:** Any person who uses a name or symbol in commerce is liable if they make a **false or misleading statement of fact** which is _____ likely to cause customer confusion _____
- f. **Business Solution** - _____ license/pay for it, don't use it/look for _____ something/someone different, get permission _____

ex: Ariana Grande sues
Forever 21
F21 hires lookalike and
Grande sues for false
indorsement